76-1059

IN THE

Supreme Court of the United States

October Term, 1976

No. A-473

LEON ROBERT ELKINS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO
BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinions below are correctly set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition with the additional fact that effective July 1, 1976, the Ohio Legislature repealed both Sections 3719.44(B) and 3719.101, Ohio Revised Code, under which petitioner was convicted.

Under Ohio House Bill 300, Section 3, effective November 21, 1975, petitioner may simply apply to the trial court for abrogation of his conviction for keeping

a house for hallucinogens, and be re-sentenced to a substantially lesser penalty for the possession for sale offense. The provisions of Section 3, House Bill 300, are set forth in the appendix, page 9.

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE USE OF A DOG, SPECIALLY TRAINED TO REACT TO THE ODOR OF MARIJUANA, CONSTITUTE AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT WHERE THE DOG MERELY SNIFFS THE EXTERIOR OF A SHIPPING CARTON IN THE CUSTODY OF A COMMON CARRIER.

II. WHETHER THE DECISION BELOW CORRECTLY APPLIED FEDERAL CONSTITUTIONAL LAW AS INTERPRETED BY THIS COURT REGARDING REQUIREMENTS FOR SEARCH WARRANTS.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Four, United States Constitution

Amendment Fourteen, United States Constitution

STATEMENT OF THE CASE

The affidavit filed in support of the search warrant for the shipping container sets forth the relevant facts of the case. The relevant facts of that affidavit are set forth in the appendix to respondent's brief, appendix, page 7.

ARGUMENT

The constitutional protections against unreasonable searches and seizures do not require that a magistrate

issuing a search warrant test the information for the degree of proof necessary to support a conviction, but only for probable cause. *United States* v. *Harris*, 403 U.S. 573 (1971); *United States* v. *Ventresca*, 380 U.S. 102 (1965).

Credibility of an informant need not be demonstrated if it is shown that his information is reliable. *United States* v. *Harris, supra.*

While the informant below was anonymous, the very explicit details of the tip were verified by police upon personal view of the shipping carton in possession of the common carrier. It was at this juncture that a specially trained dog sniffed the exterior of the carton and reacted to the odors emanating from within. Contrary to petitioner's claim, there was no entry into the box or permeation of its confines: the dog sniffed the air about the box and detected odors resultant of molecular diffusion from the contents within.

In *United States* v. *Fulero*, 498 F. 2d 748 (1974), the United States Court of Appeals for the District of Columbia rejected appellant's argument as "frivolous."

In so doing, that Court stated that

> ". . . the conduct of the police was a model of intelligent and responsible procedure."
> *Id.*, at p. 749.

Similarly, the Second Circuit Court of Appeals found no "search" in the use of a dog to sniff airline baggage. *United States* v. *Bronstein*, 521 F. 2d 459 (1975), certiorari denied, 424 U.S. 918.

Odors detected may furnish probable cause of the "most persuasive character." *Johnson* v. *United States*, 333 U.S. 10 (1948). Petitioner's contention that use of the dog to detect odors in the air outside a sealed box is constitutionally infirm was rejected by the Court of

Appeals for the Ninth Circuit. *United States* v. *Solis*, 536 F. 2d 880 (1976). See also, *People* v. *Furman*, 106 Cal. Reptr. 366 (1973); *State* v. *Quatsling*, 536 P. 2d 226 (Ariz. 1975).

II

For the first time on appeal, petitioner raises the question of sufficiency of the detecting dog's training and trustworthiness. Normally, this Court will not consider issues not presented to the courts from which review is sought. *Neeley* v. *Martin K. Eby Construction Company*, 386 U.S. 317, 330 (1967).

Additionally, respondent submits that sufficient information was contained in the affidavit in support of the search warrant to support the issuance thereof.

> "Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment."
> *Hill* v. *California*, 401 U.S. 797 (1971).

The issuing magistrate was presented with detailed information received from an anonymous source which was verified in detail by the agent's observation. c.f. *Draper* v. *United States*, 358 U.S. 307 (1959). The only detail not verified by the agent's observation was the existence of the contraband alleged to be within the package. The probability of that existence was established by use of the United States custom agent's dog which had ". . . been used on several occasions to seek out marijuana. . . ." (Affidavit, appendix, p. 7)

Clearly, probable cause existed to support issuance of the warrant.

CONCLUSION

No unreasonable search was conducted by use of a trained dog to sniff the air surrounding a package in

transit on a common carrier and thereby verify detailed information presented by an informant. It is respectfully submitted that in light of the decisions of this Court and those courts of the several jurisdictions cited within, that the Writ of Certiorari should not issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3) (6) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon R. Raymond Twohig, Jr., Handelman & Twohig, 186 East Eleventh Avenue, Columbus, Ohio 43201, Attorney for Petitioner.

Alan C. Travis

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Counsel for Respondent

APPENDIX

Affidavit in support of Warrant to Search:

"* * * * On 1/25/75, Det. Nash received the follow-information from Special Agent Charlie Banks, a Group Leader in the Cleveland, Ohio D.E.A. Office and Will Rutledge a Special Agent for the D.E.A. Det. Nash has personally worked with the above named persons and knows them to be reliable sources of information, who have given factual information in the past. Agt. Charlie Banks stated the D.E.A. Office had received an anonymous phone call and the caller stated that a parcel had been sent from San Diego, California to Ceramics and Other Nice Stuff, 1822 East Main St., Columbus, Ohio. The caller also stated the package contained marijuana. The sender of the package is alleged to be Leon Elkins of 5759 Churchill Rd., San Diego, California. The package was sent to Cleveland, Ohio, via American Airlines, Parcel Delivery, bearing Shipping Bill No. 001SAN07645411, and measuring approximately 21"x24"x46". Upon the plane's arrival in Cleveland, Ohio, Agt. Will Rutledge met the plane and verified the fact that the package was aboard the plane. Agt. Rutledge affirmed the arrival and called Customs Agent Dwight Dyche, ... an Agent for the U.S. Customs Department, and a dog handler, who used his dog, which has been used on several occasions to seek out marijuana, to verify the parcel contained marijuana. The dog indicated that marijuana was in the parcel. The above information was then relayed by telephone to Det. Nash, by Will Rutledge. Custody of the parcel was maintained by the Cleveland, Ohio D.E.A. Office until it was placed in a Quick Air Freight #8839, and shipped to Columbus, Ohio, American Air Freight Terminal where it was met by Det. Nash, Woodard, Wasem, and Webb. The

package is a U-Haul clothes box, weighing 66 lbs. and is supposed to be filled with novelties. Leon Elkins is known to the Columbus Ohio Police Department as a trafficker in drugs and has been arrested by the Columbus Police Department, disposition unknown as this time. * * * *"

Ohio Revised Code

Chapter 2925

DRUG OFFENSES

1975 H 300, §3, eff. 11-21-75, reads:

Any person charged, convicted, or serving a sentence of imprisonment for an offense under existing law that would not be an offense on July 1, 1976 shall have the charge dismissed and the conviction abrogated, shall be finally released from imprisonment, and shall have his records expunged of all information concerning that offense. Any person charged with an offense committed prior to July 1, 1976 that shall be an offense under this act shall be prosecuted under the law as it existed at the time the offense was committed and any person convicted or serving a sentence of imprisonment for an offense under existing law that would be an offense on July 1, 1976 but would entail a lesser penalty than the penalty provided for the offense under existing law shall be sentenced according to the penalties provided in this act or have his existing sentence modified in conformity with the penalties provided in this act. Such modification shall grant him a final release from imprisonment if he has already completed the period of imprisonment provided under this act or shall render him eligible for parole release from imprisonment if he has completed a period of imprisonment that would render him eligible for parole under the provisions of this act.

Courts, the Department of Rehabilitation and Correction, persons responsible for the superintendence of municipal and county jails and workhouses, the Adult Parol Authority, county departments of probation, and any other state or local governmental officer

or agency having responsibility for prisoners or parolees shall provide reasonable notice, by publication or otherwise, of the provisions of this section and shall, upon written request from any person so affected by this section, or his attorney, take all action necessary to accomplish the release, modification of sentence, or modification of record required by this section. Such officers and agencies may make further modifications of such records as in their opinion are made necessary by this section.